STATE OF MICHIGAN

COURT OF APPEALS

DANIEL VINCE CONSTANTINO, Plaintiff-Appellant,	UNPUBLISHED January 12, 2012
v	No. 300961 Kent Circuit Court
CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellee.	LC No. 10-05407-NI

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

In this first-party no-fault insurance case, plaintiff, Daniel Constantino, appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendant, Citizens Insurance Company of America (Citizens). Because we conclude that Constantino's injury did not arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, we affirm.

This case arises out of a pedestrian-snowmobile collision that occurred in January. According to the complaint filed in this case, Constantino was walking his dog on a road when he was struck by a snowmobile. Constantino alleged in his complaint that the snowmobile operator struck him because the snowmobile operator was blinded by the headlights of an oncoming motor vehicle. Constantino sustained severe injuries as a result of the accident.

Constantino was covered under a Michigan no-fault automobile insurance policy issued by Citizens at the time of the accident. He submitted an application for personal protection insurance (PIP) benefits and documentation supporting his claim for payment of PIP benefits to Citizens on March 26, 2010. Citizens denied the claim, and Constantino initiated the instant lawsuit on May 26, 2010. In his complaint, Constantino sought a declaratory judgment ordering that he is entitled to present and future first-party PIP benefits. Citizens responded by moving for summary disposition pursuant to MCR 2.116(C)(8). The trial court granted summary disposition in favor of Citizens.

The sole issue on appeal is whether the trial court properly concluded that Constantino failed to state a claim upon which relief could be granted. The trial court granted summary disposition in favor of Citizens because it concluded that the complaint did not allege facts to support a finding that Constantino's injuries arose from the use of a motor vehicle as required by

MCL 500.3105(1). On appeal, Constantino argues that his injuries arose from the use of a motor vehicle because the snowmobile driver struck him after being blinded by a motor vehicle's headlights. Accordingly, resolution of the issue requires interpretation of MCL 500.3105(1).

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(8) is proper if the nonmoving party failed to state a claim upon which relief can be granted. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).[1] Claims must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation and citation omitted). In reviewing a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(8), we review the pleadings alone, accepting all factual allegations in the complaint as true and construing them in a light most favorable to the nonmoving party. *Id.* Issues of statutory interpretation are questions of law that we review de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

The primary goal of statutory interpretation is to determine the intent of the Legislature. *Id.* at 156. "The first step in that determination is to review the language of the statute itself." *Id.* Every word or phrase of a statute should be accorded its plain and ordinary meaning unless otherwise defined by the statute. *Id.*

The no-fault act requires insurers to pay first-party no-fault benefits for "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." MCL 500.3105(1); *Cruz v State Farm Mut Auto Ins Co*, 241 Mich App 159, 164; 614 NW2d 689 (2000).[2] The no-fault act should be liberally construed in favor of persons injured in motor vehicle accidents. *Morosini v Citizens Ins Co of America*, 224 Mich App 70, 74; 568 NW2d 346 (1997). Whether an injury arises out of the use of a motor vehicle must be determined on a case by case basis. *Id.*

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[1] We note that two depositions were taken by plaintiff's counsel before the summary disposition hearing; however, the parties and the trial court specifically indicated that the motion was being decided based on the pleadings alone pursuant to MCR 2.116(C)(8) and not MCR 2.116(C)(10).

[2] We note that the parties also cite us to cases considering the requirement that a motor vehicle be "involved in" an accident; the "involved in" standard appears in MCL 500.3114(5) and MCL 500.3115(1) in regard to PIP benefits. After it is determined that an injury arose out of the use of a motor vehicle as a motor vehicle and the injured party is thus entitled to damages, a determination regarding which "involved" insurance carrier has to bear the costs and in what proportion is necessary pursuant to MCL 500.3115. The analysis for determining whether a vehicle is "involved in" an accident is similar but not identical to the analysis for determining whether the injury arose out of the use of the vehicle. See *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 31 n 7, 39; 528 NW2d 681 (1995). The "involved in" standard "encompasses a broader causal nexus between the use of the vehicle and the damage" than is required under the "arising out of" standard. *Id.* at 39. For a vehicle to be "involved in" an accident, it must be being used as a motor vehicle, there must be more than a 'but for' connection between the operation of the vehicle and the injury, and there must be an active, rather than passive, link between the injury and the use of the motor vehicle that contributed to the accident. *Id.*

Our Supreme Court has explained that no-fault coverage is only available pursuant to MCL 500.3105(1) "where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.'" *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). The connection of a motor vehicle to the injury should be "directly related to its character as a motor vehicle." *Id.* (quotation and citation omitted). While the "automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile," and the causal connection must be "more than incidental, fortuitous or but for." *Id.* at 650, quoting *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975). But for cause is the cause in fact of an injury, meaning that 'but for' a particular action, the plaintiff's injury would not have occurred. *Taylor v Kent Radiology*, 286 Mich App 490, 511; 780 NW2d 900 (2009). Accordingly, the first consideration when determining whether the requirement set forth in MCL 500.3105(1) is satisfied is the "relationship between the injury and the vehicular use of a motor vehicle." *Id.* at 659-660. "Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery of PIP benefits." *Id.* at 660.

The complaint in this case alleges that Constantino was struck and injured by a snowmobile while walking his dog on a public road, and that the incident occurred because the driver of the snowmobile was "blinded by bright lights of an oncoming vehicle causing an obstruction in his vision such that he could not avoid striking Daniel Constantino." From these facts, which we assume are true in a motion brought pursuant to MCR 2.116(C)(8), it is clear that the snowmobile driver's blindness was the but for cause of Constantino's injuries. The question before us is whether the motor vehicle's contribution to the injury resulting from this collision was *more than* the cause in fact. We conclude that it was not.

Based on the facts alleged in the complaint, it is apparent that the snowmobile was proceeding on a course of travel prior to the accident that would result in a collision with Constantino, and that a collision between them was inevitable unless one of them took action to avoid it. Thus, the accident ultimately occurred because neither took timely evasive action. Under these circumstances, the fact that headlights of an oncoming vehicle blinded the snowmobile driver does not establish that the relationship of the vehicle to Constantino's injury was more than incidental, fortuitous, or a 'but for' cause because the blinding bright lights from the vehicle was only one of many reasons why the driver of the snowmobile might have failed to notice Constantino and take evasive action. The driver's failure to observe and avoid the collision could just as easily have been the result of a setting sun, momentary inattention or any other type of distraction.

These circumstances distinguish this case from the cases relied upon by Constantino where an injury resulted from the driver of a motorcycle taking evasive action to avoid contact with a motor vehicle. See, e.g., *Bromley v Citizens Ins Co of America*, 113 Mich App 131; 317 NW2d 318 (1982). In those cases, there is a direct relationship that is more than incidental fortuitous and 'but for' between a motor vehicle and the injury even though, as is the case here, there is no actual contact with a motor vehicle. For example, in *Bromley*, the plaintiff, who was operating a motorcycle, was injured when a motor vehicle crossed the center line forcing the plaintiff to change his course of travel because if he had not swerved off the road, he would have been struck by the motor vehicle. *Id.* at 133. The only factor leading to the eventual accident and injury was the swerving of the motor vehicle. In this case, the snowmobile driver did not

change his course of travel as a result of the motor vehicle and could have failed to perceive Constantino for any number of reasons. Consequently, we conclude that the snowmobile driver's failure to observe and avoid Constantino because he was blinded by the headlights of a motor vehicle did not establish a relationship to a motor vehicle that is more than incidental, fortuitous and 'but for.'

Further, we find Constantino's reliance on the analysis in *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998) unavailing to support his argument that the injuries arose out of the use of a motor vehicle as a motor vehicle. In *McKenzie*, the Court explained that "[w]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of automobiles." *Id.* at 225-226. Accordingly, the Court determined that MCL 500.3105(1) "intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *Id.* at 220. Constantino maintains that headlights are closely related to the transportational function of an automobile. We agree that headlights are closely related to the transportational function of an automobile; however, that fact alone does not authorize the recovery of no-fault benefits.

In *McKenzie*, the plaintiff was injured when carbon monoxide fumes leaked into a parked camper/trailer while he was sleeping and temporarily asphyxiated him. *Id.* at 216. The Court found that the injury that occurred while the plaintiff was sleeping in a parked camper/trailer was too far removed from the transportational function of the vehicle. *Id.* at 226. The analysis set forth in *McKenzie* regarding whether an injury resulted from the use of a motor vehicle that was closely related to its transportational function represents an additional requirement for recovery of no-fault benefits applicable to certain factual scenarios. In this case, the *McKenzie* analysis is inapposite because Constantino cannot demonstrate that the injury was more than 'but for,' incidental, or fortuitous, as required by *Thornton*. *Thornton*, 425 Mich at 660.

Consequently, we affirm the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) in favor of Citizens because Constantino did not allege any facts tending to show that his injury arose out of the use of a motor vehicle as a motor vehicle as required for no-fault benefits; accordingly, Constantino failed to state a claim upon which relief can be granted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly